No. 539

IN THE

Supreme Court of the United States

October Term, 1944

AMEY THLOCCO, LORIN RAY, Guardian of the Person and Estate of Amey Thlocco, an Incompetent Person, and OREL BUSBY, Special Guardian Ad Litem,

Petitioners

versus

MAGNOLIA PETROLEUM COMPANY, *Respondent*

BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

WALACE HAWKINS
CHAS. B. WALLACE
EARL A. BROWN
Dallas, Texas
Attorneys for Respondent.

E. Duncan & Co., Brief Printers, Dallas

INDEX

Page

AUTHORITIES CITED

AUTHORITIES—(Continued)

AUTHORITIES—(Continued)

STATUTES CITED

No. 539

IN THE

Supreme Court of the United States

October Term, 1944

AMEY THLOCCO, LORIN RAY, Guardian of the Person and Estate of Amey Thlocco, an Incompetent Person, and OREL BUSBY, Special Guardian Ad Litem,

Petitioners

versus

MAGNOLIA PETROLEUM COMPANY, *Respondent*

BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

STATEMENT OF THE CASE

In view of the issues in this case, respondent believes it could be of assistance to the Court by stating the facts in the chronological order in which they came to the knowledge of Magnolia Petroleum Company (hereinafter referred to as Magnolia).

On either the 17th or 18th day of February, 1936 two men, Louis Ledbetter and W. A. Billingsley, residents of the City of Wewoka, Oklahoma, came to the office of Magnolia in Dallas. Ledbetter desired to sell an oil and gas lease owned by himself and his law partner, Bat Shunatona, and he proposed to offer it to Magnolia. He asked Billingsley to accompany him in order to introduce him to C. L. Gladden, Magnolia's Vice President, with whom Billingsley had been acquainted for many years.

The two men presented themselves at Gladden's office and, after the introduction was completed, Ledbetter produced a plat showing the location of the tract covered by the oil and gas lease. The tract consisted of 130-3/4 acres and was located in Titus County, Texas. Ledbetter offered the lease for sale to Gladden. Gladden referred him to Ralph Talley, Superintendent of the Land and Lease Department of the Company, and escorted Ledbetter to Talley's office. Following the introduction in Gladden's office, Billingsley departed and had no further connection with the matter. Ledbetter renewed his offer to sell in his conference with Talley, and was told by Talley to return the following day for an answer. In the meantime, Talley conferred with Company geologists and M. J. McLaughlin, Vice President and head of the Producing Department of the Company, and it was agreed that the lease should be purchased at the consideration named by Ledbetter, which was fifty dollars per acre.

The following day Ledbetter returned and signed a purchase contract. Thereupon, Talley requested that the Com-

pany be furnished with an abstract of title for examination, and the abstract was delivered at that time by Ledbetter. The matter was then referred to W. B. Sutton, one of the Company attorneys, for title examination, and he examined the abstract and prepared a written opinion thereon (R. 387). In the title opinion it was recited that legal title was vested in Kenneth Mainard, Trustee. The lease offered for sale by Ledbetter had been executed by Kenneth Mainard, Trustee, in favor of Bat Shunatona, as lessee. Ledbetter was the law partner of Shunatona and had an interest in the lease. Sutton made a number of requirements on the title, none of which affect the issues here, and within three or four days thereafter Ledbetter furnished the curative matter and a written assignment from Shunatona; and the title was approved. Thereupon, Magnolia issued its check in favor of Bat Shunatona in the amount of the purchase price and delivered it to Ledbetter, Shunatona's agent. In due order of business the check was cashed.

At the time this transaction was consummated none of the representatives of Magnolia Petroleum Company participating in the purchase of the lease was given any information or notice of any character that Amey Thlocco had an interest in the land. The testimony of Gladden (R. 371), of Talley (R. 248), of Haralson, Talley's assistant (R. 259), and of Sutton (R. 773) is direct and positive on the issue that no mention was made in the said negotiations of Amey Thlocco or her beneficial interest in the land. The same is true of the testimony of Ledbetter (R. 755 et seq.) and of Billingsley (R. 692 et seq.).

Sutton testified (R. 773 et seq.) that he found the title vested in the name of Kenneth Mainard, Trustee; that there was nothing in the abstract to show Amey Thlocco's interest in the property and no such information was furnished him from any other source; that the practice of taking title in the name of an individual as "trustee" was a common practice in Texas; that he had seen hundreds of oil and gas leases executed by such trustees; and that at one time the whole East Texas Oil Field was in the name of Joiner, Trustee. He further testified that he was familiar with Article 7425a, Revised Civil Statutes of Texas, [1] dealing with conveyances from trustees, and that he relied upon this statute in approving titles executed by trustees, and, therefore, made no inquiry as to any beneficial interest in the land.

The foregoing facts were the only facts known to Magnolia at the time it purchased its said lease. The evidence described and the facts recited hereinafter cover matters that transpired or became known to Magnolia subsequent to its purchase of the lease.

On October 3, 1936 Magnolia commenced the drilling of a well on this lease. It was completed as a producer on

---

[1]Article 7425a is entitled "An Act for the Protection of Those Dealing with Trustees," and Section 1 of the Act reads as follows: "Section 1. Where a trust is created, but is not contained or declared in the conveyance to the trustee, or when a conveyance or transfer is made to a trustee without disclosing the names of the beneficiary, or beneficiaries, the trustee shall be held to have the power to convey or transfer or encumber the title and whenever he shall execute and deliver a conveyance or transfer or encumbrance of such property, as trustee, such conveyance or transfer or encumbrance shall not thereafter be questioned by any one claiming as a beneficiary under such trust or by any one claiming by, through, or under an undisclosed beneficiary, provided that none of the trust property in the hands of said trustee shall be liable for personal obligations of said trustee."

October 26, 1936. Thereafter Magnolia kept one drilling rig running continuously until sixteen wells were drilled (R. 156 and 819). The total cost of drilling and operating the property to December 31, 1942 was $681,002.35. The proceeds of oil produced to said date amounted to $768,-533.88. The net status was $87,531.53 as of said date. Approximately five years had elapsed from the drilling of the first well before Magnolia had its investment returned to it.

Upon obtaining production from the premises Magnolia commenced paying royalties to Kenneth Mainard, Trustee, lessor. A total of $35,070.16 was paid to Kenneth Mainard, Trustee, for royalties accruing up to February 1, 1941, at which time payment was suspended on account of litigation in Oklahoma over the royalty interest.[2] Thereafter, the royalty was impounded until after settlement of the Oklahoma litigation, and during the suspension period up to February 28, 1943, an additional amount of $19,076.42 accrued, and said amount was paid into the registry of the trial court in this case on order of Court.

On April 15, 1941 (more than five years after Magnolia acquired its lease) Honorable Orel Busby, attorney of Ada, Oklahoma, addressed a letter to Earl A. Brown, Magnolia attorney in Dallas, in which Magnolia's title to its oil and gas leasehold was questioned. The letter stated that the writer had filed a suit in Oklahoma attacking the royalty conveyances made by Kenneth Mainard, Trustee, and the

---

[2]Kenneth Mainard, Trustee, had executed a certain royalty deed to one J. B. Terry covering an undivided one-half interest in the royalty, and in the Oklahoma action Amey Thlocco was contesting the validity of this deed.

same question involved in that case was also present in Magnolia's ownership of the leasehold. It was asserted that Kenneth Mainard, Trustee, had no individual interest in the land and that he was holding it in trust for Amey Thlocco, who was a wealthy full-blood Indian woman, residing near Wewoka, Oklahoma.

Investigation then developed these facts: Amey Thlocco had been adjudged incompetent to manage her business by the County Court of Seminole County, Oklahoma, on the 5th day of March, 1929, and one Hugh Barham was appointed as her guardian. A large amount of Amey's money came into his hands as such guardian. Of this amount Barham misapplied and embezzled a total of $15,775.40. When this was discovered Barham was removed as guardian, prosecuted, and sent to the penitentiary for this and other crimes. Kenneth Mainard was then appointed as Amey's guardian, and brought suit against Barham and the surety on Barham's guardianship bond, Fidelity Union Insurance Company. Judgment against the insurance company was obtained on October 5, 1933 in the amount of $15,775.40. The insurance company negotiated for a settlement, and an agreed settlement was reached in which the judgment was discharged by the payment of $6,250 in cash, the transfer of certain corporate stocks, and the conveyance of three tracts of land in Texas. One of the three tracts is the tract involved in this action. Title to the land was not taken in the name of Amey Thlocco, but to Kenneth Mainard, Trustee. This action was taken upon the advice of M. F. Robert-

son, United States Indian Probate Attorney,[3] whose reason was that, by taking title in Mainard's name as Trustee, control of the property could be retained in Oklahoma. The attorneys representing Mainard accordingly directed Fidelity Union Insurance Company to execute the conveyance in favor of Kenneth Mainard, Trustee, and this was done.

At the time Kenneth Mainard, Trustee, executed the oil and gas lease to Bat Shunatona, as lessee, he advised Probate Attorney Dennis Petty (who had succeeded M. F. Robertson in the Wewoka District) of the offer he received from Shunatona, and he had also filed a petition with the County Court of Seminole County, under whose jurisdiction he served as guardian, requesting that the sale of the lease be authorized.[4] Probate Attorney Petty recommended the sale of the lease to Shunatona (Petty's testimony R. 450), and the said County Court ordered the sale on February 14, 1936. None of these matters were brought to the attention of Magnolia, however, at the time it purchased

---

[3]In Oklahoma the United States Probate Attorneys for the Indians are "local representatives of the Secretary of the Interior." They derive their authority under Sec. 6 of the Act of Congress approved July 27, 1908 (35 Stat. 312). Their duties are to advise and represent full blood Indians in all matters connected with their "restricted" lands, although it is the practice of these attorneys to assume the right to represent Indians, whether restricted or unrestricted, whenever they so desire and regardless of whether the particular Indian desires such representation. (Testimony J. H. Finley, Supervising Probate Attorney, R. 460 et seq.) The Indian Country in Oklahoma is divided into six districts for the purpose of dividing areas of service for these attorneys. There is a probate attorney for each district and a Supervising Probate Attorney at the United States Indian Agency at Muskogee, Oklahoma. J. H. Finley was Supervising Attorney in 1936 and still holds that office, and M. F. Robertson was Probate Attorney of the Wewoka District at the time that suit was filed.

[4]It is not here contended that a County Court in Oklahoma would have any jurisdiction to approve a lease on lands located in Texas; it does appear, however, that Mainard was seeking assistance in the leasing of the land from all of the authorities who were asserting any right to control the estate of Amey Thlocco.

its lease. The abstract showed a straight chain of title into Kenneth Mainard, Trustee, without mention of Amey Thlocco, the last conveyance being the deed from Fidelity Union Insurance Company to Kenneth Mainard, Trustee, dated November 15, 1934 (R. 131).

Much of the evidence adduced at the trial of the case has been omitted in the foregoing statement. Such additional evidence as may be necessary to explain a proposition hereinafter asserted will be supplied in the argument thereunder.

The cause was tried in the District Court of the United States for the Eastern District of Texas on February 1 and 2, 1943, and all issues were decided in favor of Magnolia Petroleum Company. Original findings of fact and conclusions of law made by the trial court are shown at pages 53 to 65, inclusive, of the Record. Supplemental findings of fact made at the instance of petitioners appear at pages 66 to 72, inclusive, of the Record. The Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court (141 Fed. (2d) 934).

QUESTIONS PRESENTED

In the Petition for Certiorari herein (page 2 et seq.) the questions presented are stated to be twelve in number. Certain of them are cumulative, however, and in the interest of brevity respondent's brief is presented under the following propositions:

(1) Federal Indian restrictions are not applicable to the alienation of these lands. (Counter to Petitioners' Questions 1 and 2)

(2) **The laws of Texas, and not Oklahoma, are determinative of Amey Thlocco's capacity to deal with lands owned by her in Texas.** (Counter to Petitioners' Questions 3, 4, 5 and 6)

(3) **Article 7425a, Revised Civil Statutes of Texas and the decisions of Texas courts authorized Magnolia to purchase the lease executed by Kenneth Mainard, Trustee, as the owner of the land, without obligation to inquire as to the beneficial interest therein.** (Counter to Petitioners' Questions 7 and 8)

(4) **Magnolia Petroleum Company was a bona fide purchaser for value.** (Counter to Petitioners' Questions 9 and 10)

(5) **Under Texas law Amey Thlocco was sui juris and, by accepting royalties with full knowledge of all the facts, she ratified and confirmed Magnolia's lease.** (Counter to Petitioners' Question 11)

(6) **There are no opinions of this Court, or of the Circuit Courts, in conflict with the opinion rendered by the Circuit Court of Appeals in this case.** (Counter to Petitioners' Question 12)

(7) **Petitioners are barred from attacking Magnolia's lease under the various statutes of limitation of the State of Texas.** (Not mentioned by Petitioners)

(8) **The absence in this action of parties owning one-half mineral and royalty interests is fatal to petitioners' right to cancel the lease, and deprives the Court of jurisdiction to entertain the cross-action.** (Not mentioned by Petitioners)

SUMMARY OF THE ARGUMENT

I

No grounds exist which justify the exercise by this Court of its power to grant a writ of certiorari. The principal issues are disputed fact questions, which have been found adversely to petitioners by the trial court and the Circuit Court of Appeals. The legal principles involve only matters of local law, and the decisions of the State of Texas have been followed.

II

On the merits, petitioners' contentions are not tenable for these reasons:

1. Federal Indian restrictions are not applicable here because they do not apply to lands located in the State of Texas; the control of alienation of private property in Texas is purely a State function over which the Federal Government has no authority. Furthermore, the lands involved in this case were unrestricted, in any event, because: (1) they were not acquired through restricted funds, (2) title thereto was not taken in the name of the Indian, and (3) the deed contained no restriction against alienation.

2. The laws of Texas, and not of Oklahoma, determine Amey Thlocco's capacity to deal with her lands in Texas. An adjudication of incompetency to manage property in Oklahoma does not require a recognition of disability in Texas, where the only ground justifying the appointment of a guardian is that such person must be "of unsound mind."

3. Magnolia Petroleum Company could purchase a lease executed by Kenneth Mainard, Trustee, without inquiring as to the ownership of the beneficial interest in said land by reason of Article 7425a, Revised Civil Statutes of Texas, and the common law in Texas, of which said statute is cumulative. Furthermore, the deed to Mainard, Trustee, containing habendum to the grantee "and his heirs and assigns forever," empowered Mainard to sell and convey the property under Texas decisions.

4. Magnolia Petroleum Company was a bona fide purchaser for value. Whether or not Magnolia was required to deal with the beneficiary, if known, in the purchase of its lease, the overwhelming weight of the evidence, as found by both of the Courts below, shows that the Company had no notice of Amey Thlocco's interest in said lands at the time it purchased its lease.

5. Under Texas law Amey Thlocco was sui juris. She knew that Mainard had taken title to the land as trustee; that he had executed a lease to Magnolia Petroleum Company; that the Company had drilled a number of wells on the land; that Mainard was collecting royalties therefrom and paying the money to her; and that she was getting $600 per month as such royalty. Therefore, she ratified and adopted the lease.

6. There are no opinions of this court, or of the Circuit Courts, in conflict with the opinion rendered by the Circuit Court of Appeals in this case.

7. The statutes of limitation of the State of Texas are a complete bar to the attack on Magnolia's lease. The un-

contradicted evidence shows: (1) that Magnolia had been in peaceable adverse possession of its mineral rights for more than five years prior to the filing of this case, (2) under conveyance duly executed and recorded, showing title from the sovereignty of the soil, and (3) had been making timely payment of ad valorem taxes on such minerals. These facts clearly bring the case within the provisions of Articles 5507 and 5509, Revised Civil Statutes of Texas, known, respectively, as the three year statute and the five year statute of limitations in the State of Texas.

8. At the time this action was filed Amey Thlocco owned only an undivided one-half interest in the royalty and mineral rights in this land. In Texas an oil and gas lease contract is indivisible, and the absence from this action of parties owning the remaining one-half mineral interest is fatal to petitioners' right to cancel the lease.

ARGUMENT

I

No grounds exist which justify the exercise by this Court of its power to grant a writ of certiorari.

1. *This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.* Under well-established principles, the power of this court to grant writs of certiorari under Section 240 (a) of the Judicial Code (28 U. S. C. A. 347a) and Rule 38 of the Supreme Court Rules, rests in the discretion of the Court. As promulgated in the Rules and as often stated

by this Court, this is a power to be exercised sparingly, and only in cases where there are special and important reasons therefor, or in order to secure uniformity of decisions.

As will hereinafter appear, this case will be finally reduced to the sole question of whether or not Magnolia Petroleum Company had the right to purchase the lease executed by Kenneth Mainard, Trustee, without any obligation to inquire as to the ownership of the beneficial interest in the lands covered by the lease. This is purely a matter of local law, governed by the statutes and the decisions of the State of Texas. The Supreme Court of Texas has passed directly upon this issue in the case of *Gulf Production Company v. Continental Oil Company*, 139 Tex. 183, 164 S. W. (2d) 488, and it was the duty of the Courts to follow the law as construed in that case.

2. *The Circuit Court of Appeals in rendering its decision disregarded no controlling Texas decision.* Both the trial court and the Circuit Court of Appeals followed the Texas law as interpreted in *Gulf Production Company v. Continental Oil Company*, supra. This decision was by the Supreme Court of Texas. The Texas decisions upon which petitioners profess to rely do not support their position. But even if they did, it will be observed that these decisions were rendered by intermediate courts prior to the date of the decision in the Continental case. The opinion in the latter case is the last expression from the highest court in Texas.

II

With reference to the "Questions Presented" (Petition, 2) we present our counterarguments under the propositions hereinabove set forth.

1. **Federal Indian restrictions are not applicable to the alienation of these lands.** Petitioners persist in the statement that the funds misappropriated by Barham, as guardian of Amey Thlocco, were "restricted funds," although there is no evidence to support such an assertion and the statement has been challenged at every stage of this proceeding. "Restricted funds" are funds belonging to restricted Indians and under the supervision and control of the Secretary of the Interior. In his deposition in this case Supervising Probate Attorney J. H. Finley defined restricted funds as follows:

> "Any money that is in the Treasury of the United States under the supervision of the Secretary of the Interior, and credited to a half blood or more, I consider restricted."

In United States v. Williams, 139 Fed. (2d) 83 (certiorari denied 64 S. Ct. 943, 88 L. Ed. 839, rehearing denied 64 S. Ct. 1258, 88 L. Ed. 1186), the Court held:

> "The royalties derived from the restricted allotment were held in trust by the Secretary of the Interior for the benefit of William Bushyhead *and continued to be restricted while so held.*" (Emphasis ours)

The very words "restricted funds" import their own meaning. Inasmuch as restrictions on Indians generally are exercised by the Secretary of the Interior, it naturally

follows that restricted funds are those under the control of the Secretary of the Interior.

Therefore, if Barham had control of Amey Thlocco's funds, they were not under the control of the Secretary of the Interior. Barham couldn't embezzle funds reposing in the Treasury of the United States. No effort has been made in this case to trace the source of funds which were misappropriated by Barham; the record is completely silent as to how these funds were derived. But the fact that they were in the possession of Barham and not under the control of the Secretary of the Interior is the only circumstance required to show that they were unrestricted.

Yet if it should be conceded that the funds were restricted funds, it would not follow that these lands were subject to restrictions upon alienation. Not all lands acquired through purchase with restricted funds are subject to restrictions upon alienation. In addition thereto, there must be a clause in the deed to the Indian restricting alienation thereof without the consent or approval of the Secretary of the Interior. Section 1 of the Act of Congress of July 27, 1908 (35 Stat. 312) provided for restrictions upon the alienation of lands allotted to Indians, and also provided for removal of restrictions by the Secretary of the Interior wholly or in part, under such rules or regulations concerning the terms of sale and disposal of the proceeds for the benefit of the respective Indians as he "may prescribe." Pursuant to such statutory authority, the Secretary of the Interior prescribed a rule providing that, where land was purchased for a restricted Indian with restricted funds, the same should be evidenced by "a conveyance of

such lands to be made on a form of conveyance containing an habendum clause against alienation or encumbrance until April 26, 1931." *United States v. Williams*, supra.

On June 27, 1928 the rule was amended so as to provide for a restrictive clause in such deeds which should prohibit the alienation of any such lands "unless approved by the Secretary of the Interior or the restrictions from said land are otherwise removed by operation of law." 25 Code of Federal Regulations, sec. 241.44; *United States v. Williams*, supra. No deed was executed to Amey Thlocco. The deed to Kenneth Mainard, Trustee, contained no clause restricting alienation.

In United States v. Williams, supra, the court said:

> "The land purchased by such funds continued to be restricted until April 26, 1931, by virtue of the rule above quoted *and the restrictive clause in the deed.*" (Emphasis ours)

Citing *Sunderland v. United States*, 266 U. S. 226; *Mott v. United States*, 283 U. S. 747, and other authorities.

It is, therefore, clear that there were no restrictions on alienation of this land for the reasons: (1) the lands were not purchased with "restricted funds" for the benefit of the Indian; (2) title to the lands has never vested in Amey Thlocco, the Indian; and (3) there was no restrictive clause in the deed by which alienation was in any way restricted.

Furthermore, it was never intended by Congress that restrictions upon alienation of the lands of Indians of the Five Civilized Tribes should exist in any State other than

the State of Oklahoma. The right to restrict alienation of Indian lands in Oklahoma was reserved by the Federal Government at the time of the erection of the State of Oklahoma. Otherwise, such power would not have been retained in the United States, for it is the general rule that the power of a State to control the disposition of real estate within its boundaries is exclusive. The Constitution conferred no power of control upon the Federal Government in such matter. "The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of Federal authority." *United States v. Fox*, 94 U. S. 315. "A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the Federal Government has no power." *Thurlow v. Massachusetts*, 5 How. 588. There are many decisions of this Court holding that the alienation of real estate is under the exclusive control of the State in which the real estate is located. *Oakey v. Bennett*, 11 How. 33; *McGoon v. Scales*, 9 Wall. 23; *Olmsted v. Olmsted*, 216 U. S. 386; *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65; *Arndt v. Griggs*, 134 U. S. 316; *Langdon v. Sherwood*, 124 U. S. 74; *United States v. Illinois C. R. Co.*, 154 U. S. 225.

In Oklahoma, however, the situation is different from that of the other States. The lands in Indian Territory which were ceded by treaty to the Five Civilized Tribes, are now a part of the State of Oklahoma. Prior to statehood, Congress possessed and exercised control of the alien-

ation of lands belonging to the Indians, and this right was retained by the Federal Government in the Acts by which Oklahoma acquired statehood. Section 1 of "An act to Enable the People of Oklahoma and of Indian Territory to Form a Constitution and State Government," known as The Enabling Act, which was passed by Congress and approved June 16, 1906, provided that the people of Oklahoma might adopt a constitution and become the State of Oklahoma, provided that nothing therein should "limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties" etc. The Enabling Act was accepted by the people of Oklahoma in their Constitutional Convention on April 22, 1907. (Const., Okla. Stat. Ann., p. 219). The Constitution adopted by the State of Oklahoma (Article I. Sec. 3) expressly recognizes the right of the United States to control the alienation of Indian lands. Thus, there can be no question about the right of Congress to impose restrictions on the lands of Indians in the State of Oklahoma.

In Texas no such power was retained by the Federal Government when Texas became a state. Texas was admitted to the Union on December 29, 1845 by a joint resolution of the United States Congress (5 U. S. Stat. 797; 9 U. S. Stat. 108; *Group No. One Oil Corporation v. Bass*, 38 Fed. (2d) 680) "on an equal footing in all respects with the original States." (*United States v. State of Texas*, 162 U. S. 1) In said resolution the Federal Government acquired no control over the private ownership of lands in Texas. These lands were originally under the Republic of Texas,

and control thereover became vested in the State of Texas to the exclusion of any Federal authority. Consequently, Congress had no power to place any restriction upon the alienation of Texas lands. Such control is purely a function of the State government.

It is submitted that the principles stated above are controlling on the issue of whether this land was restricted. Moreover, the authorities cited by petitioners do not support their position under any theory. The case of *Murray v. Ned*, 135 Fed. (2d) 407, is not in point. There the Court said that "the single issue presented is whether the latter Act reimposes restrictions on land from which restrictions have been removed, when the land descends to fullblood Indian heirs." There is no question here of *reimposing* restrictions; no restrictions have ever attached to this land. The other authorities cited by petitioners deal with questions entirely different from the issue in this case.

2. The laws of Texas, and not Oklahoma, are determinative of Amey Thlocco's capacity to deal with lands owned by her in Texas. The capacity to take, hold, and transfer realty is governed by the lex loci rei sitae (15 C. J. S. 923, 924 and authorities cited; Restatement, Conflict of Laws, Sec. 216).

Amey Thlocco is not a person of unsound mind. She was adjudged by an Oklahoma probate court to be "mentally incompetent to manage her said estate without assistance." The Oklahoma statute on guardianship (Sec. 851, Title 58, Okla. Stat. Ann.) provides for the appointment of guardians for two classes of persons, (1) one who is "insane,"

and (2) one who is "from any cause mentally incompetent to manage his property."

In Texas the rule is different. There is no provision of the Texas statute authorizing the appointment of a guardian for one who is merely incompetent to manage his property. The test of jurisdiction to appoint a guardian in Texas is that such person must be "of unsound mind." Articles 4102 and 4267, Revised Civil Statutes of Texas. A person whose only disability is that he is not "mentally competent and capacitated to manage, care for and preserve his estate" is not subject to guardianship in Texas. *Greenwood v. Furr*, 251 S. W. 332.

In Oklahoma an adjudication of incompetency to manage property is not an adjudication of unsoundness of mind. *In re Nitey's Estate*, 175 Okla. 389, 53 Pac. (2d) 215; *Shelby v. Farve*, 33 Okla. 651, 126 Pac. 764.

To summarize, the only disability authorizing the appointment of a guardian in Texas is that of unsoundness of mind. The Supreme Court of Oklahoma has held *(In re Nitey's Estate*, supra) that an adjudication of incompetency to manage business is not an adjudication of unsoundness of mind. Yet, petitioners assert that the Federal courts in Texas should recognize the adjudication of incompetency to manage business in Oklahoma as creating a disability in Texas, where no such grounds for disability exist. In other words, they are asserting that Texas courts and Federal Courts in Texas should accord Oklahoma judgments broader effect than the Oklahoma Courts themselves will recognize. The Full Faith and Credit Clause of the Federal Con-

stitution does not require any such recognition. It only requires that judgment of a sister state shall have such validity and effect in every other court in the United States which it would have in the State where it is pronounced, and that whatever pleas would be good to a suit brought thereon in such State, and none others, can be pleaded in any other court of the United States. *Williams v. North Carolina*, 317 U. S. 287; *Fauntleroy v. Lum*, 210 U. S. 230.

When the matter of Amey Thlocco's competency was presented to the trial court in connection with the ownership of Texas land, the Court was limited to a consideration of whether she would be under disability in Texas. The trial court found that she was a person of sound mind at the time Fidelity Union Insurance Company conveyed the land to Kenneth Mainard, Trustee, and has been of sound mind continuously since that date down to the time of trial (Finding of Fact No. 7, R. 57). And in its conclusions of law the Court held (Conclusion No. 11, R. 64) that Amey Thlocco is not a person non compos mentis under the laws of the State of Texas. Five witnesses testified that Amey Thlocco was of sound mind, and there was no testimony to the contrary. The Record contains (p. 413) a stipulation by Honorable Orel Busby, counsel for Amey Thlocco, that she is not an insane person but merely incompetent to manage her property unassisted.

No court has held Amey Thlocco to be an insane person. She is an uneducated full-blood Indian with limited business experience, but her mind is sound. The case of *Kiker et al. v. United States*, 63 Fed. (2d) 957, is referred to, and

petitioners erroneously state that Amey Thlocco was there held to be a person of unsound mind. As a matter of fact, the Court found only that she had been defrauded, but also found specifically (p. 958) that she thoroughly understood the transaction and knew the purport of the deed and the effect it would have on her interest.

Since she was not a person of unsound mind, she was not under disability in Texas, and her acts and conduct in connection with the ownership of this land are to be governed and interpreted by the laws of Texas.

No fraud was plead or proved in this case. As said by the Circuit Court of Appeals (141 Fed. (2d) 935, Note 2): "The 8th finding of the District Judge was: 'No fraud has been pleaded or charged against the plaintiff, Magnolia Petroleum Co., and none has been proved,' and the record fully supports this finding."

Therefore, the sole question here is whether or not Amey Thlocco was under disability in Texas; the adjudication of incompetency to manage business in Oklahoma does not affect the situation here.

3. **Article 7425a, Revised Civil Statutes of Texas, and the decisions of Texas courts authorized Magnolia to purchase the lease executed by Kenneth Mainard, Trustee, as the owner of the land, without obligation to inquire as to the beneficial interest therein.** The provisions of this statute have already been stated (Note 1). These provisions are plain. The law was enacted for the specific purpose of protecting those who purchase from trustees, and relieving them of the necessity of ascertaining the identity

of the beneficiaries in such a trust, and securing consent or approval of the trustee's conveyance from them. The statute has been interpreted and upheld by the Supreme Court of Texas in *Gulf Production Company v. Continental Oil Company*, 139 Tex. 183, 164 S. W. (2d) 488, and the case is directly in point here. The Circuit Court of Appeals so found. 141 Fed. (2d) 937.

Magnolia's lease was executed by Kenneth Mainard, Trustee. Title was acquired by Kenneth Mainard, Trustee, from Fidelity Union Insurance Company by deed which contained no trust provisions; it was merely a straight deed, naming the grantee as Kenneth Mainard, Trustee. There was nothing in the record to show that Amey Thlocco was the beneficiary.

Moreover, Section 7425a, supra, is but cumulative of the common law as it existed in Texas at the time the Act was passed. *Barker v. Temple Lumber Company* (Tex. Com. App.) 12 S. W. (2d) 175, held that where a conveyance was made to a person as trustee without showing on its face the nature of the trust or the name of the beneficiary, the word "trustee" must be regarded only as descriptio personae.

Furthermore, it is the rule in Texas that, where a conveyance of this character is made to an individual as trustee and the habendum clause provides that the property shall be held by the grantee and "his heirs and *assigns* forever," the grantee is thereby empowered to sell the property without any restrictions whatever. The inclusion of the word "assigns" in such clause creates the power. *Craw-*

ford v. El Paso Land Improvement Company (Tex. Civ. App.), 201 S. W. 233; *Gabert v. Olcott* (Tex. Supreme Court), 86 Tex. 121, 23 S. W. 985. The deed to Kenneth Mainard, Trustee, had an habendum containing the words "unto the said Kenneth Mainard, Trustee, his heirs and assigns forever." Thus, this case falls squarely within the rules announced in the two cases last cited.

4. **Magnolia Petroleum Company was a bona fide purchaser for value.** Petitioners contend that Magnolia had notice of Amey Thlocco's beneficial interest in the land at the time it purchased its oil and gas lease, and proceed on the theory that, if Magnolia had such notice, it was required to deal with the beneficiary. This theory is erroneous. Under the preceding proposition it is clear that the trustee may sell and convey, and the purchaser may buy from the trustee, regardless of whether the identity of the beneficiary is known. However, the facts overwhelmingly show that Magnolia had no such notice, and the trial court so found (Finding No. 3, R. 55). This finding is fully supported by the testimony of Ledbetter, who sold the lease, and of all the representatives of Magnolia who participated in the purchase. The Court's finding was made on this testimony, and the Circuit Court of Appeals held that the finding was amply supported by the testimony. Therefore, any discussion of the testimony on which this finding was based is pretermitted.

At page 31 of the petition it is asserted that Magnolia was not an innocent purchaser because it had actual notice of Amey's ownership through its lease buyer, Dunaway, who lived at Wewoka, Oklahoma. Dunaway was one of

about thirty-five "leasers" employed by Magnolia in the nine States in which it was doing business in 1936. A leaser is one whose duty it is to report on conditions in a certain district assigned to him, and submit to the Company for purchase such leases as the leaser would recommend. Dunaway's district comprised about fifteen counties in Northeastern Oklahoma; the land here involved was located in the State of Texas. The uncontradicted evidence of Magnolia officials was to the effect that no leaser had authority to purchase a lease or handle any transaction involving acreage outside of his own district, and it is not claimed that Dunaway had anything to do with the purchase of this lease. It is claimed, however, that Dunaway knew of the existence of Amey Thlocco's beneficial interest because he lived in the same county in which Amey Thlocco lived, and two witnesses, one an itinerant lease broker and the other a discharged employee of the United States Indian Agency, testified as to certain alleged conversations that they had had with Dunaway, wherein Dunaway had evidenced knowledge of the fact that Amey owned some lands in Titus County, Texas. Dunaway died June 12, 1941, nearly two years prior to the date on which this case was tried.

Much testimony was offered to impeach the witnesses who testified as to Dunaway's knowledge of Amey's ownership. The two witnesses did not identify any particular tract of land. Their conversations with Dunway were private conversations, based on general rumor, and did not involve a sale of the land or lease. Furthermore, all of Dunaway's superiors testified that he had never advised them of any knowledge he may have had of Amey Thlocco's

interest in the land. United States Probate Attorney Petty testified that when the lease was sold to Shunatona in February, 1936 he asked Dunaway for some information about the area, and Dunaway said he knew nothing about it. It is submitted that the Court very correctly held that Dunaway had no knowledge of such ownership, or that, if he did have personal knowledge of it, he never brought it to the attention of his Company.

The Courts of Texas have held that testimony which concerns only conversations with a deceased person is "the weakest and the most unsatisfactory kind of evidence." *Coats v. Elliott*, 23 Tex. 613; *Logan v. Logan* (Tex. Civ. App.), 112 S. W. (2d) 523. Again, the rule in Texas is that, where it is sought to impute to the principal the knowledge of an alleged agent, the agent must be one who is empowered to act for the principal "with reference to the very subject-matter to which the notice relates." *Missouri-Kansas-Texas Ry. Co. v. Belcher*, 88 Tex. 549, 32 S. W. 519; *Taylor v. Taylor*, 88 Tex. 47, 29 S. W. 1057; *Hines v. Chaddick* (Tex. Civ. App.), 63 S. W. (2d) 263; *Adams v. La Salle Life Ins. Co.* (Tex. Civ. App.), 99 S. W. (2d) 386. Furthermore, it is held in Texas that one is not put on inquiry by mere rumor or suspicion, nor by the existence of a common reputation in the neighborhood that a third person has an interest in the property. 43 Tex. Jur. 676; *Strong v. Strong*, 128 Tex. 470, 98 S. W. (2d) 346.

It is submitted, therefore, that the Court's findings (Finding 4, R. 55) and conclusions to the effect that any private knowledge, if any, on the part of the deceased leaser, Dunaway, was not binding on Magnolia Petroleum

Company, are amply supported by the evidence and the authorities.

5. **Under Texas law Amey Thlocco was sui juris and by accepting royalties with full knowledge of all the facts, she ratified and confirmed Magnolia's lease.** Amey Thlocco gave a deposition in this case (R. 327). She testified (1) that Kenneth Mainard told her about acquiring the land in Texas as a result of the Barham lawsuit, and that he was going to take the title in his name as trustee for her and she agreed to it; (2) that she knew about the execution of the lease to Shunatona and that the lease was later acquired by Magnolia Petroleum Company; (3) that she knew Magnolia had drilled oil wells on the land and she was getting $600 per month from that source; (4) that Kenneth Mainard received the money, and either turned it over to her or deposited it;[5] (5) that all of the money that she had received for more than a year had come from royalty under Magnolia's lease, as the Government ceased sending her monthly payments out of the restricted funds she had on deposit at the Indian Agency at Muskogee, Oklahoma (then amounting to $140,000) when it was learned that she was receiving income from the Magnolia lease; (6) that she was satisfied to have Magnolia operating her

---

[5]Kenneth Mainard, as guardian, accounted to the probate court of Seminole County, Oklahoma, for all royalties received under the Magnolia lease, amounting to a total of $35,070.16. Counsel for Amey Thlocco (the same counsel who appears in this case) contested the approval of Mainard's guardianship accounts, contending he had misappropriated some of the funds. In a contested hearing the Court found that Mainard had accounted faithfully for all funds received except $233.07, which the Court did not find to have been misappropriated but merely not satisfactorily explained (R. 839, 595). Hence, petitioners' charge that Mainard was faithless as guardian and trustee (Petition, 27) finds no support in the evidence.

property in Texas, provided that there was no fraud, and she knew of none; and (7) that she was not advised that suit would be brought against Magnolia Petroleum Company.

The Court found that she was not a person non compos mentis under the law of Texas, then made the finding that her own testimony fully supported the pleas of ratification, estoppel, waiver and laches (R. 57-64).

No claim is made that such evidence would not be sufficient to establish ratification. The defense thereto is that Amey Thlocco had no capacity to ratify the lease. This question has already been discussed under Proposition number 2, supra.

6. There are no opinions of this Court, or of the Circuit Courts, in conflict with the opinion rendered by the Circuit Court of Appeals in this case. Petitioners have cited no opinions of this Court, or of the Circuit Courts, which conflict with the opinion rendered by the Circuit Court of Appeals of the Fifth Circuit in this case. As we have heretofore pointed out, the case of *Murray v. Ned*, 135 Fed. (2d) 407, deals with an issue entirely different from the question in this case. The same is true of *United States v. Brown*, 8 Fed. (2d) 564. Reference to these cases will show that they are not in point. Further discussion on comparison of these cases is believed to be unnecessary.

7. Petitioners are barred from attacking Magnolia's lease under the various statutes of limitation of the State of Texas. Independent of any other claim, this proposition is completely decisive of this case. Magnolia entered into

possession of its mineral estate on these lands on October 3, 1936, and commenced the drilling of a well for oil and gas. It has remained in possession continuously, drilling and operating the property for the production of oil. The parties hereto have stipulated that such possession has been peaceable and adverse down to the date of the filing of the suit and of the answers of opposing parties herein, and that such possession has been held by record title thereto from the sovereignty (R. 130 and 148). More than five years had elapsed between the time Magnolia entered into such possession and the date of the filing of this suit on April 24, 1942.

Article 5507, Revised Civil Statutes of Texas, provides that suits to recover real estate against a person in peaceable and adverse possession thereof under title shall be instituted within three years next after the cause of action accrued. Under the terms of the stipulations the petitioners were barred under this statute. Article 5509, Revised Civil Statutes of Texas, provides that every suit to recover real estate against a person having peaceable and adverse possession of lands and paying taxes thereon, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued. The three requirements of (1) possession, (2) paying taxes, and (3) claiming under a deed or deeds duly registered, are all present in this case, and the Court found correctly that peitioners were barred under this statute, also.

In Texas oil and gas are susceptible of ownership, seprately from the surface of the land, and an oil and gas

lease severs the mineral estate from the remainder of the fee. *Texas Company v. Daugherty*, 107 Tex. 226, 176 S.W. 717. It is also well settled that statutes of limitation applicable to real estate apply with equal force to mineral rights, since the ownership of mineral rights constitutes ownership of real estate. *Hanks v. Magnolia Petroleum Company* (Tex. Civ. App.), 14 S.W. (2d) 348, affirmed 24 S.W. (2d) 5; *Clements v. Texas Co.*, 273 S. W. 993; *Laird v. Gulf Production Co.*, 64 S.W. (2d) 1080, writ dismissed; *Broughton v. Humble Oil and Refining Company*, 105 S. W. (2d) 480; 7 Texas Law Review, 568-580.

Indeed, no defense is made that the facts sustaining the statutes of limitation are not present. The purported defense to such plea is the alleged unsoundness of Amey Thlocco's mind. This position is untenable. In Texas the rule is that, where legal title to property is vested in a trustee, limitation runs against the cestui from the time that the trustee becomes entitled to sue. In other words, the beneficiary is barred when the trustee is barred. *Collins v. McCarty*, 68 Tex. 150, 3 S. W. 730, 2 Am. St. Rep. 475. And the rule applies with equal force even though the beneficiary may be a person of unsound mind. *Broussard Trust et al. v. Perryman* (Tex. Civ. App.), 134 S. W. (2d) 308, 313(error refused). Thus, the statutes of limitation are applicable regardless of whether Amey Thlocco was sui juris or non compos mentis.

8. **The absence in this action of parties owning one-half mineral and royalty interest is fatal to petitioners' right to cancel the lease, and deprives the Court of jurisdiction to entertain the cross-action.** At the time Amey Thlocco

filed her pleading seeking affirmative relief against Magnolia she was the owner of an undivided one-half interest in the royalty and mineral rights. An undivided one-half interest had theretofore been conveyed by Kenneth Maynard, Trustee, to one J. B. Terry, and was owned by the said J. B. Terry and his assigns. The rule in Texas is that an oil and gas lease is an indivisible contract, and when rescinded it must be rescinded as a whole, both as to parties and subject matter. The owners of the outstanding one-half interest in the minerals did not join in the suit to cancel Magnolia's lease. The absence of these parties from the action is fatal to the attempt to cancel the lease. *Sharpe v. Landowners Oil Assn.*, 127 Tex. 147, 92 S. W. (2d) 435; *Royal Petroleum Corp. v. McCallum*, 135 S. W. (2d) 958; 10 Tex Jur. 392 and authorities there cited.

The defense of petitioners to this proposition is that, in the litigation they had with J. B. Terry and his assigns in Oklahoma, there was contained in the judgment a provision that the judgment should not estop Amey Thlocco from instituting or maintaining a suit to recover property belonging to her other than the interest involved in that action. The complete answer to such contention is that Magnolia Petroleum Company was not a party to the Oklahoma action and did not give its consent to the entering of any such judgment. Certainly, such a provision in that judgment could not deprive Magnolia of any of its contractual rights under its said lease, nor could it enlarge any rights or privileges on the part of the lessors in said lease with regard to bringing a suit for cancellation. This

principle is so fundamental that we omit any further discussion thereof.

CONCLUSION

The principal legal question asserted by petitioners is that the Federal Government may impose restrictions upon the alienation of lands in Texas. Under many decisions of this Court it is submitted that this proposition must be rejected. The power to control the alienation of real estate in Texas is purely a matter of State law.

The remaining issues in the case are principally fact questions, and each and every fact necessary to a decision of this case has been decided adversely to petitioners, both by the trial court and the Circuit Court of Appeals. Under these conditions it is submited that this Court will not undertake to review the facts.

It is, therefore, respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

WALACE HAWKINS
CHAS. B. WALLACE
EARL A. BROWN
Attorneys for Respondent.